In the Supreme Court
OF THE
United States

October Term 1977

No. 77-1574

Daniel A. DeKelaita,
Petitioner,

vs.

Shell Oil Company,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit**

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on February 28, 1978.

The opinion of the Court of Appeals for the Ninth Circuit is not for publication. CCH Trade Regulation Reporter, 1978-1, No. 325, 3/20/78, p. 4. A copy of the Opinion is attached hereto as Appendix A. The opinion of the District Court was in the form of a statement to the

jury after granting a directed verdict for Shell Oil Company. A copy of this portion of the trial transcript is attached hereto as Appendix B. A copy of the judgment below is attached hereto as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 28, 1978. The jurisdiction of this court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Does the defense by a major oil company to allegations that it restrains the independent judgment of thousands of its dealers as to prices and products, that it informs the dealers in writing that they are free to select retail prices of their own choosing and purchase products from the supplier of their choice absolutely foreclose a trier of fact from concluding that the written statements were used to hide agreements and understandings violative of the antitrust laws?

2. Can a major oil company assert as a defense to the entry into price-fixing agreements that it has not coerced dealers to enter into such agreements, but has only used persuasion to obtain the agreements?

3. Do the antimonopoly provisions of the Sherman Act prevent a major oil company from carrying out a policy of treating independent businessmen as mere employees so that it may not terminate a dealer without liability when it takes over his business pursuant to a continuing attempt to control its dealer structure and market entry?

4. May a party in proving an intention to monopolize show a course of conduct entered prior to the dates of actual injury to a plaintiff by a F.T.C. judgment that Shell Oil Company had violated §5 of the Federal Trade Commission Act in utilizing its leverage as lease owner to foreclose dealer choice as to large and substantial amounts of tires, batteries, and automotive products, *Shell Oil Co. v. F.T.C.*, 360 F.2d 470 (5th Cir. 1966), and documents from its own files that show control of dealer prices to control market entry?

STATUTES INVOLVED

The statutes involved are §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, § 3 of the Clayton Act, 15 U.S.C. § 14 and § 4 of the Clayton Act, 15 U.S.C. § 15. These statutes are printed and attached to the petition as Appendix D herein.

STATEMENT OF THE CASE

1. INTRODUCTION

This is an action in which a businessman of small financial means alleges he was used by Shell Oil Company (hereinafter Shell) to lead price wars during the period approximately December, 1971 to August, 1972 at which time Shell (as did all major oil companies) abandoned

its dealer aid or dealer assistance price program. During most of this period it leased with large subsidization an extraordinarily large and modern service station in Mt. View, California to petitioner. Thereafter, Shell determined to take it over for wholly owned company operation. In so doing it deprived petitioner of the results of his efforts and goodwill he developed at his service station business. This takeover was part of a national program to acquire large gallonage units for employee operation. Shell's determination to enter into wholly owned operation arose as a result of its belief that enactment of state franchise laws and adverse judicial opinions would allow loss of control of the dealer and loss of control over market entry which it had used under the dealer-short term lease system.

Petitioner held a three year lease due to expire in March 31, 1975, but terminable within a year on 30 day notice. Petitioner was terminated as a service station lessee and dealer on January 31, 1973, effective March 23, 1973 (Pl. Ex. 14). He refused to leave voluntarily, but after Shell cut off his gasoline supplies and credit cards he left the station (Def. Exs. AG, AI) on March 30, 1973 (See Pl. Exs. 189-197, Tr. 1365, et seq.). Immediately upon acquisition, the station opened as a wholly owned, company operation (Pl. Ex. 37).

The complaint was filed on March 22, 1974 (Cr. 1-13) and became an expedited matter. (Cr. 1058). Trial was by jury and commenced on April 21, 1975 (Tr. 126). Petitioner concluded his case on Friday, May 2, 1975, and respondent moved for a directed verdict (Tr. 1767). The court then ordered the filing of simultaneous memoranda

and held oral argument. The court directed a verdict on May 6, 1975 (Tr. 1841-1859, Appendix B herein).

Shell is engaged in part in the refining and marketing of refined petroleum products including automotive gasoline and motor oils. It also markets products of other companies' manufacture including tires, batteries, filters, air cleaners, wiper blades, and Shell specialty products (Pl. Exs. 189, 375, 452). These products are boxed in a Shell container. Shell does not market these products directly to the consumer and until the latter part of 1972 exclusively utilized leases and products agreements as a means of selling these articles to the public (Pl. Ex. 177). The problem is, however, that Shell entered into a standard form lease agreement and product agreement which made these dealers independent businessmen with complete legal control of the business operation. It is stated in the standard form lease, Pl. Ex. 7, para. 11:

> "**11. Lessee's Business.** Nothing in this Lease shall be construed as reserving to Shell any right to exercise any control over, or to direct in any respect the conduct or management of, the business or operations of Lessee on the Premises; but the entire control and direction of such business and operations shall be and remain in Lessee, subject only to Lessee's performance of the obligations of this Lease. Neither Lessee nor any person performing any duties or engaged in any work on the Premises at the request of Lessee shall be deemed an employee or agent of Shell."

Shell has not honored the instruments of its own creation, and has, instead, embarked upon a program which utilized the dealers as mere employees of Shell, its papers being

utter sham. Thus, in *Shell Oil Company v. F.T.C.*, 360 F.2d 470, the Third Circuit affirmed the Federal Trade Commission's findings (Pl. Ex. for Id. 168) that in the mid-50's Shell had caused the dealers to purchase substantial amounts of TBA of other marketers in order to obtain a 10% override. In that case the tied product consisted of TBA product manufactured or distributed by third party companies, Firestone Tire and Rubber Company and Goodyear Tire & Rubber Company. The only basic distinction between the evidence here and the *FTC* case is that this case involves Shell label product and direct sales to dealers.

2. SHELL OIL COMPANY

Shell does business in 41 states through branded outlets. In 1971 it sold products to 9,400 directly supplied outlets and 11,000 other dealers affiliated with 850 Shell jobbers. According to the U.S. Dept. of Commerce, 1972 Census of Retail Trade, Area Statistics, United States, July, 1975, page 7, there were 226,459 service stations in the United States in 1972. Shell's outlets therefore constitute 9% of all United States outlets. All of the dealer outlets sold gasoline under Shell trademarks. The dealer outlets handled more than 98% of all of Shell's gasoline sold at the retail level in 1971. Of the 9,400 directly supplied dealerships, all but four were then operated by independent businessmen (statement of Shell's Vice President of Marketing, Frank H. Staub, Pl. Ex. 177). Most of the Shell direct supplied stations were operated by lessee-dealers who had lease and supply agreements with Shell or with an independent distributor of Shell branded gasoline (Cr. 15). Of 227 retail gasoline service stations in the San

Francisco District, in 1972, 208 were dealer leased "L" stations (Pl. Ex. 374). The San Jose District contained 234 "L" stations (Pl. Ex. 127-15). The Sacramento District contained 215 "L" stations (Pl. Ex. 128-61). This District extended into Nevada (Pl. Ex. 128). For June 1972-June, 1973 Shell sold approximately 13.6% of California automotive gasoline sales of 10,223,805,000 gallons. (Table 24, p. A-33, The California State Board of Equalization, Annual Report, 1972-73. Pl. Ex. 452: Shell states its gallonage sold for 1972 was 1,393,555,000 gallons).

Although Shell has refineries in California, gasoline is shipped into California from Shell's State of Washington refinery at Anacortes; 120,727,000 gallons in 1972 (Pl. Ex. 452). Another 7,000,000 gallons were supplied by Arco and Mobil (Id.).

3. DAN DEKELAITA

Mr. DeKelaita was born in Iraq and came to the United States in 1956 (Tr. 1165A). He served in the United States Army from 1960 to 1962. (Tr. 1232-1234). He has a masters in physics and taught high school. (Id.)

4. VIOLATIONS SHOWN

(a) Shell fixes the dealer's resale prices.

A dealer lease package consists of the dealer lease, the dealer product agreement, a security agreement, a gallonage collection allocation agreement, an agreement authorizing Shell to inspect the dealers' monthly analysis and financial statements, an agreement providing for participation in a dealer meter plan assistance program, and a promissory note (Pl. Exs. 7, 8, 202, 203, 211, 213, 198). In addition, Shell enters into credit card arrangements

with dealers and charges the dealers back when the billing is unpaid (Pl. Ex. 8, para. 6, 179, 187, 188).

The meter assistance program may be described as a device which maintains control of the retail price through maintenance of an arbitrary high wholesale price. The concept involved here is that there is a so-called "normal" price (Tr. 463-470). This normal price is set forth in the price survey forms identified as Pl. Ex. 224 and 225. "Normal" retail is 7½¢ over the dealer tank wagon price with respect to Shell regular gasoline. The market price is called by Shell "current sub-normal". When the market retail price of major identified units is lower than the normal price, the dealers in the price zone to which Shell assigns the service station are eligible to obtain price assistance based upon Shell supporting the dealer 75/25 for every one cent drop in difference between the sub-normal and the normal retail to a stop point which guarantees the dealer a minimum margin. (Tr. 121, 125-127). The system does not authorize price assistance in the event a Shell dealer dropped his price below normal, nor did Shell authorize price assistance when a non-major dropped its price below normal (Tr. 463-475). When there was to be a drop in retail price, the dealer was telephoned by Shell and told the Shell's suggested retail price, that the prices were to be changed on a certain date and time. Shell specified the precise retail price (See Pl. Ex. 359, p. 5). When Shell desired the retail price to go up, it withdrew assistance and so informed the dealers (Tr. 587, 483-486, Pl. Ex. 359, pp. 50-51). It was asserted at the trial by Shell's retail representatives that they would always say to the dealer they were free to sell at any

price (Tr. 715). This was expressly denied by Ward DeKelaita (Tr. 1118) and Dan DeKelaita (Tr. 1252, 1287):

> "Q. Now is anything said or done on those occasions to the effect that these are suggested prices and you are free to charge any price you want?
>
> A. Never."

Under The Meter Plan Price Allowance forms the dealer notes his meter readings at the time of the price announcement and notes the meter readings at the time of the next variation, specifies the allowance given to him over the phone by Shell and as authorized by Shell and reports to Shell the total allowance in dollars (Pl. Ex. 359, "form D-303"). The document ends with the following:

> "I hereby certify to Shell Oil Company that the above data are true and correct. Permission is given Shell to inspect pump meters, take gas inventory and audit my books as to such data. I agree to refund any allowances given, as a result of errors in this record, to Shell upon notice."

Price leading dealers were allowed by Shell to overstate their gallonage without fear of audit in order to recapture some of their losses when they dropped the retail prices before official authorization by the Region (Tr. 1714).

Shell's announced policy was that it would only meet competition of majors. Thus, Shell's counsel informed the jury that the dealer assistance program was never used for aggressive purposes and it was solely defensive (Vol. IA, Tr. 161). The dealer assistance was only granted, according to Shell, when a dealer requested it. This

record, however, showed that Shell was the aggressive price cutter and operated through the dealer by entering into express arrangements with the dealer which provided that he was to lower his price in order to start a so-called price war, or establish sub-normal pricing. The essence of this case is that Mr. DeKelaita was at a small Shell service station for a few months while he demonstrated that he would become an aggressive price cutter for Shell Oil Company (Tr. 1249-1287). Shell rewarded DeKelaita with a lease opportunity in one of the San Francisco District's most elaborate new service stations. The Mountain View station had 20 pumps, 4 lube bays, 8 pump islands, ten double tandem covers, 227 feet on the El Camino side, 216 feet on Bailey side and 154 feet on Mountain View Avenue (Pl. Ex. 23, 33). It was in the midst of heavy traffic. During the period of December, 1971 to March, 1972 when Mr. DeKelaita was operating the Pacifica station at Eureka Square, he was given special rental assistance (Pl. Ex. 239). He followed Shell's directions to price below the then current suggested prices (Tr. 1253, 1254). He then became known as, "Dan, the Tiger." When he talked to Mr. R. A. Phillips, the then Sales Supervisor of the San Francisco District, he was told to push the juice, and to keep pushing the juice (Tr. 1267).

Shell, however, did not merely stop at reward, but would exercise punishment for those who did not follow suggested prices. Mr. Daniel DeKelaita's brother, Mr. Ward DeKelaita, took over a Shell service station on Skyline Blvd., San Bruno, in the San Francisco District, from a Mr. Ted Herrera. Mr. Ward DeKelaita testified

at the trial that he was told by Shell representatives that Herrera was getting out because his gas prices were too high (Tr. 1151). The testimony specifically included the statement:

> ". . . and you know the reason that he is getting out is because of gas prices being too high . . ."

The penalty imposed was not only lease termination, but was lease termination without the possibility of selling the dealer's non-Shell products to the incoming dealer. As Mr. Ward DeKelaita testified, he was told by Mr. Ron Benton, a Shell supervisor (Tr. 112):

> "By the way, when you move into that station, I want you to buy all the Shell products, but none others because he is suing us."

He further testified that there were items that he did not know whether they were Shell or not.

> "There was a vending machine, candy machine and I was ready to buy them from Mr. Herrera, and Ron Benton walked into a front office where the wall was opposite to Ted Herrera's face, and he went to me many times and nodded his head meaning 'No, don't buy it'. and I turned around and told Ted Herrera, 'I don't think I need them.' " (Tr. 1114).

He testified it took Mr. Herrera three days hauling out his inventory (Id.) and that he had to buy equivalent products elsewhere (Tr. 1115).

Another device used to support an agremeent on pricing below the then market price was to allow the participating dealers rental adjustments. Pl. Ex. 239 records Mr.

DeKelaita's supervisor, Mr. Ron Benton, seeking a rental concession for him. This was the rental concession which reduced the rent half a cent a gallon. It followed Mr. Benton's statement that the dealer was pricing three cents below suggested, "on his own." The concession was to last for two months.

The rentals called for in the Mt. View lease were such that Mr. DeKelaita felt he could not meet them and he discussed the matter with Mr. Phillips when he negotiated the acquisition of the lease. Mr. Phillips told Mr. DeKelaita at that time (Tr. 1268):

> "You don't have to worry, Dan; we will help you to get off (sic) your feet."

Shell, in fact, reduced the rent by waiving rent to March 31, 1972 and reduced the rent from 2.1 cents a gallon to one cent with a $500 minimum to September 1, 1972 (Pl. Ex. 40). This was allowed on two occasions (Pl. Ex. 221, 12). About the middle part of June, 1972, Mr. DeKelaita contacted Mr. Phillips for further adjustment. At that meeting Mr. Phillips added up all the pennies which Mr. DeKelaita had absorbed on his own. He then multiplied them by the gasoline volume at the price reductions, then checked the difference between them and the rent adjustments and stated, "You are not throwing your money away, you know. You are getting a break on the rent." (Tr. 1285). Thereafter, Mr. DeKelaita was given his second rental adjustment which was substantially the same as the first adjustment lasting until August 31, 1972. But Shell's price assistance program was terminated in August, 1972, and when the next rental adjustment came up Mr. DeKelaita was still facing the

same problem of building up what he described as a monster of a station. He then did not receive the same kinds of rent adjustments he had theretofore received. Mr. Calonico was the Shell representative with whom Mr. DeKelaita had to converse with respect to this rental adjustment. Mr. Calonico told Mr. DeKelaita he had not gone down far enough in his pricing "below suggested." Instead of going down he had gone up (Tr. 1312). He informed Mr. DeKelaita, "he had written him off" (Tr. 1313).

The price leader program of Shell thus called for the dealer to go between two cents and not more than four cents of the Shell suggested price for the purpose of triggering a price war (see Tr. 1253-54, 1294-96).

Another Shell dealer testified to the same kind of price conversations with Shell representatives to which plaintiff DeKelaita testified. See testimony of Douglas Kerseg (Tr. 939-999). He testified specifically that the Shell representative, Mr. Mayes, informed him that he "should reduce price ahead of competition within the trade area and increase volume" (Tr. 948). Mr. Kerseg was told that price assistance would be available at some future time (Tr. 950). Mr. Kerseg built the volume of the station so that it appeared in Shell's top ten list, but he lost $10,000 in the process (Tr. 953-956). He was forced to obtain a smaller station in Redwood City (Tr. 961). The same price leadership instructions were given as to the Redwood City location (Tr. 964). Another $5,000 was lost (Tr. 965).

Mr. Ward Dekelaita testified that he could not price independently of the price Shell suggested (Tr. 1145,

1151-1153). He also had been asked to sell at prices lower than Shell's currently subnormal (Tr. 1118).

(b) Shell controlled the dealers purchases of gasolines, tires, batteries and automotive accessories.

Shell maintains a quota system for each dealer for each sales representative. These are broken down into gasoline, motor oil, antifreeze, specialties, tires, batteries and filters (Pl. Ex. 126, entitled San Francisco District Review, December 20, 1972). Each dealer's purchases of these products are also broken down and reviewed. Every dealer's lease is reviewed 90 days before expiration (Tr. 753-754). Shell inspects the service station to see what brands are carried. Mr. David Clowes, a Shell sales representative, noticed Anco wiper blades at petitioner's Mountain View station at one of these inspection visits. The record described that he asked Mr. DeKelaita why he had a double inventory of Anco wiper blades and Shell's (Tr. 871):

> "Q. So it was one of the things that he had that didn't have Shell on it on display; is that it?
> A. It didn't have Shell, yes.
> Q. So you commented on it; is that correct?
> A. Uh-huh. (affirmative)."

One of the duties of the Shell sales representative would be to go around to the dealers delivering the advertising display material for Shell tire sales (Tr. 894-895).

Mr. Ward DeKelaita specifically recalls a Shell representative, Mr. Ron Benton, visiting his station after he had purchased some air filters and oil filters from other sources than Shell (Tr. 1116). Ward DeKelaita went to

hide the boxes. Mr. Benton walked in and the first thing he did, as told by Mr. Ward DeKelaita (Tr. 1116):

> ". . . he just looked through the boxes and he said, 'What,' he said, 'what's this shit.' I said, 'These are items I bought. Why?' He said, 'You are doing same thing Ted Herrera is doing', and he shook his head and was very upset."

Ward DeKelaita specifically remembered Mr. Benton told him he didn't want me to have non-Shell products (Tr. 1118). Mr. Ward DeKelaita changed service stations from San Bruno to downtown San Francisco, 6th and Harrison Streets, about September, 1972 (Tr. 1119). Mr. Ward DeKelaita testified to a conversation with the Shell representative, Mr. Romoli. He testified he was told as follows (Tr. 1122-1123):

> "And he told me that I needed some tires. At that time I had about, close to 180 tires. And he said: I think you should make an order for another 100-110 tires. And I said, I don't need any tires, I have enough. So we had a little argument there, and before he left, he says: By the end of the year you won't be in this station. And then he left. I was glad he left, I was very upset."

Mr. DeKelaita then reported Mr. Romoli came back to say that the termination would have nothing to do with the tires but that Shell was going to take the station over for company operation, and Mr. DeKelaita did receive a letter of termination (Tr. 1123-24). During cross-examination Mr. Ward DeKelaita testified (Tr. 1134):

> "Q. Now, sir, for example, do you recall the last time you bought tires at the Sixth and Harrison station; do you remember when you bought an order of one hundred tires.

> A. Yeah, I, I, I order them.
>
> Q. Yes, sir. You ordered them on your own, didn't you sir?
>
> A. Yes. I was afraid of my lease so I had to build up a good (sic) relationship—"

The record showed that Shell was engaged in the practice known as two-teaming in which the dealer sales representative goes with the tire and battery representative to obtain orders from the dealers (Tr. 741). Shell had no hesitation to enter into inventory checking plans with the dealers (Tr. 737-741).

In order to obtain the Mountain View station Mr. DeKelaita had to purchase approximately $3,000 in gasoline, $2,000 in motor oils and $10,000 in TBA (see Pl. Ex. 100-46, 99, 189). Mr. DeKelaita described the transaction as follows (Tr. 1272-1274):

> "Well, Phillips was getting ready to go in vacation. He took me to Calonico, which is the tire battery man and he says, 'Dan, is going to get this new unit El Camino and Bailey and he's going to come up with $5,000 and we are going to loan him $12,000 and I want you to install him because I am going on vacation.' So we sat down, me and Calonico, and he pulled out some sheets, forms of tires, batteries, accessories, and we broke that 12,000 plus 5,000 into, divided among different items that I was going to order so I didn't know at that time it was calculated, but we had a rough guesstimate as to how much or almost all the money was used up for those orders so that was all in that meeting."

Mr. DeKelaita was stocked with so many Shell tires in 1972 at Mountain View that he lost the use of two lube

bays which were used to house the tires (Tr. 1381, 1009-1010). Mr. DeKelaita had to sell these tires at his cost (Id.) Despite Mr. DeKelaita's efforts to sell the Shell tires at his cost, he had at the time of the termination in March, 1973, $4,527.37 of Shell tires on hand (Pl. Ex. 190). Mr. DeKelaita was allowed to sell his tires to Shell. Mr. Kerseg could not do the same. It was against company policy. He had purchased 300 tires at Shell's trade fair, could not sell them, asked Shell to take the tires back. Shell refused (Tr. 956-957). At the second station, in Redwood City, Mr. Kerseg had to leave the station in view of his mounting losses. He left the inventory and equipment for Shell to dispose of. Although assured by Mr. Phillips that it was sufficient to pay Shell's outstandings, this turned out not to be the case. The inventory and equipment was sold to a dealer and Mr. Kerseg ended up facing a claim by Shell that he owed it $4,000 (Tr. 967-969).

The demonstrated effectiveness of the Shell tying program is shown in the purchase by Mr. DeKelaita of the outgoing inventory at the Eureka Square station. This dealer was shown to have a complete stock of Shell products with only the exception of $5.75 of Pennzoil (Pls. Ex. 2-K, Tr. 146-47). The inventory included approximately $500 of Shell tires (Id.). Yet, the Shell line was higher priced than competitive lines (Tr. 1005, 1116, 1134, 1137, 1158, 1472, 1621). In fact, the dealer's price from Shell may often be higher than the retail price (Tr. 1472-1476).

A competitive tire company representative testified he could not get Shell dealers to carry stock of his tires

although they would pick up tires or order them on a spot basis (Tr. 1001-1023).

The same was true as to accessory products (Tr. 1630-1633). A pie wagon salesman testified that when Shell went to distribution of windshield wipers with Trico-made blades, Shell went to the service stations and reboxed the dealer inventory into Shell labeled boxes (Id.).

As to gasoline, Mr. DeKelaita was specifically told that the 80,000 gallon monthly gallonage figure which appeared in the lease and the gasoline products contract were his minimum purchase figures (Tr. 1268, 1666).

(c) Mr. DeKelaita was terminated pursuant to Shell's plan to acquire large volume stations for company operation.

Shell possessed about 20% of the gasoline market in Northern California (Tr. 1851). Shell's ability to control its service station dealers faced serious challenge by mid-1972 stemming from the enactment of state franchise laws which applied to gasoline marketers and from decisions such as *Shell Oil Co. v. Marinello* entered on July 21, 1972. 1972 Trade Cases, ¶74,178. The stage was set for Shell to embark upon acquiring large volume conventional service stations for self operation. In June, 1972, a 4-bay service station in Contra Costa County was made a company operation. At that time only the Vice President of Marketing could approve the conversion (Pl. Ex. 42). Expansion of company operation to include full facility stations was contemplated for mid-1972 (Pl. Ex. 42A). On October 5, 1972 orders went out to all the marketing regions: Eastern, Central, Western, to nominate four units for conversion to S-1 stations, company operated

stations, prior to December 31, 1972 (Pl. Ex. 88 attached herein as Appendix E). The units involved were 70,000 gallons a month or above. These conversions were required in order to conduct a study program to establish economic guidelines for self operation. The Western Region nominated a station in San Francisco at Van Ness and Washington streets (Pl. Ex. 91). This was later changed to a service station in San Rafael (Pl. Ex. 92). That service station was leased by a Mr. Gilmore. Mr. Gilmore had hired an attorney to fight the termination by Shell (Tr. 539-541).

Mr. DeKelaita did not hear about a lease cancellation until after he had attended a dealer meeting on January 17, 1973 called by Shell. At this meeting the dealers in the San Francisco District were informed by Mr. Clifford, the District Manager, that Shell was considering acquiring two service stations in the San Francisco District (Tr. 1326-1327). A promise to give the dealers equivalent stations was made (Id.). At no time did Shell officially inform Mr. DeKelaita that his station was being taken over to become company operated. However, before Mr. DeKelaita received the letter of termination dated January 30, 1973, he had a conversation with Mr. Blankenfeld, the Territory Manager, that Mr. DeKelaita would have to leave (Tr. 1330-1). Shell had wanted to him to sign a mutual termination agreement with release language and would offer him a station (Id.). Mr. Blankenfeld then reported to Mr. DeKelaita that his failure to sign the release clause with Shell was brought to Mr. Clifford's personal attention and that Mr. Clifford had told Mr. Blankenfeld to tell DeKelaita that Shell would buy the wheel alignment ma-

chine upon signing the mutual termination agreement. He then pulled out another termination agreement and stated all you have to do is sign here (Tr. 1333-1335). Mr. DeKelaita testified, he asked (Tr. 1335):

> "'By the way, have you found a dealer that wants to buy a $5,000 wheel alignment machine . . .' He said: 'This is foreclosure.' I said: 'What do you mean by foreclosure.' He says: 'We are going to take it over, and we are going to run the unit.'"

This happened before receipt of the termination letter (Tr. 1335).

Prior to the meeting Mr. Clifford ran into Mr. DeKelaita, discussed his operations and informed him that he was going to call Houston (Shell's central headquarters) (Tr. 1326).

Mr. Clifford, in fact, has testified to two inconsistent versions of what occurred at the Dealer Territorial Meeting. At the trial he testified he did not tell the dealers of any Shell take over plans concerning conventional service stations, but limited the plans to non-conventional stations known as self-serve (Tr. 371). But at his deposition Mr. Clifford testified that he had discussed rumors of conventional service stations going company operation (Tr. 371-375). Shell never did produce a copy of Mr. Clifford's speech (Tr. 370).

Notwithstanding the files showing that the regions were requesting nominations for stations to become company operated, the requirement that the conversion take place at the end of the year 1972, the need to fulfill plans for a unit in the San Francisco District, that the plan to

convert had already reached the rumor stage among the dealers and the aforesaid statement of Mr. Blankenfeld, Shell took the position at the trial that at the time of termination, Mr. DeKelaita was being terminated for his faults and not pursuant to a take-over plan (Tr. 558). The trier of fact is asked to believe that the reasons for the termination by Shell Oil Company were without need of explanation. But, if not, the reasons were as follows:

1. Decrease in gasoline gallonage;
2. Closing of the station on New Year's Day and Christmas Day;
3. Closing of the station at late evening;
4. Blocking off of the Bailey Street side of the station;
5. Closing of the lube bays;
6. Failure to supervise employees;
7. Inability to sell himself;
8. Managing money;
9. Financial strain;
10. Failure to merchandise properly.

These were all conveniently listed in a memorandum from Mr. Clowes to Mr. Blankenfeld, reportedly signed January 16, 1973 (Def. Ex. Y). Mr. Clowes, however, could not be sure when he actually submitted the memorandum to Mr. Blankenfeld (Tr. 820-821). Indeed, the memorandum is directly impeached by a memorandum written by Mr. Clowes dated January 26, 1973 seeking Shell to grant Mr. DeKelaita additional lease adjustments (Pl. Ex. 100-2). It states, in Mr. Clowes' handwriting:

"This DDR to reflect continuation of amendment due to severe competition and through no fault of dealer unit is unable to meet lease minimums."

Of equal significance is the fact that the entire attempt to place fault on Mr. DeKelaita's operations is inconsistent with the provisions of Shell's own lease which provides that a dealer is to have 15 days prior notice in order to correct violation of lease provisions (Pl. Ex. 7, ¶9). No such 15 day notice was given Mr. DeKelaita. Shell's legal position at the time of trial was that the termination letter was not based on cause. It was expressly stated that Shell's termination was based on its absolute right at the end of twelve months to terminate the lease and Shell had elected to take that option (Tr. 621-621A).

In January of 1973 the District Manager did not have authority to convert a station to permanent salary operation (Pl. Exs. 450, 146, p. 12.03, 42, 42A). There exists no documentation concerning the conversion of the Mountain View station to salary operation from the files of Shell Oil.

Elaborate efforts were undertaken by Shell to have Mr. DeKelaita sign a release with it and not test the issues involved here (Tr. 1330-1336), including threats not to purchase the wheel alignment machine (Tr. 1345, 1351, 1354), that it was useless to fight Shell and that another dealer had done so and was now in trouble with the Internal Revenue Service (Tr. 1344-1346, 1362).

(d) Substantial evidence existed and other evidence was erroneously excluded that the take over of the Mountain View station was to continue Shell's control of its share of the oil market and entry.

The record here showed clearly that in the 1970's Shell utilized independent dealers to start price wars to increase Shell's market position (Tr. 1253-1254, 2590). Since dealer price assistance, for the record only was based on meeting the competition of majors, a method outside the procedure manual statement of policy, had to be devised to forestall the pricing by the non-majors which is generally one or two cents below the majors (Tr. 474-475, and see discussion below). The price surveys of Shell were falsified to show a major station was lower than the Shell stations. Mr. DeKelaita remembered he was at or below the Arco station in Pacifica. But the Shell surveys did not reflect this fact (Tr. 1499, 1504).

Petitioner had offered proof that Shell intended to use below cost pricing to control the market, and the independents' growing share of the market, as established by Shell's own statements of explanation of its pricing decisions in the 1960's (Pl. Exs. for Id. 379A, 378, 376, 390, 295, 296, 391, 378, 376A, 379, 377, 297, 298, 378A, 307, Cr. 672-675, 687-689). These studies and statements proved that Shell sought to narrow the share of the market held by the independents and that control of the retail pricing of the dealers would be the means to obtain this objective.

As stated in Pl. Ex. 379A for Id., page 6:

"Shell's decision was made on the basis of the above factors. We adopted a 3¢ differential at dealer tank wagon in combination with a new realistic 'normal' and a general policy of defensive pricing close to im-

portant Independent and secondary competition. The new package price policy was announced officially May 17, 1961, though it had been gradually spread to most areas prior to this. The results were electrifying, first, in terms of the chaotic price conditions which ensued as Shell's strategy made its impact, secondly in terms of the stability that gradually developed later in 1961, and thirdly, in terms of the many highly desirable and profitable results that came about concomitantly."

Shell had previously stated in its Shell West Coast Marketing Automotive Gasoline Report, dated July 15, 1961 (Pl. Ex. 378A for Id.):

> "*Shell v. Independent/Concubines.* Shell's 1960 volume and share-of-market loss was attributed to our non-competitive position at retail versus major independents and major concubines (Wilshire), (Gulf), Clipper, Signal (Socal). Prior to March, 1961 these marketers were selling at retail 2 cents or more below Shell dealers. In March 1961 [changed to May 17, 1961] Shell administered its prices to enable Shell dealers to meet such companies as Signal (Socal) and Seaside (Tidewater) dealer prices and to be within 1¢ of major independents and Wilshire (The Texas company took the initiative from Shell to do this in the L.A. Basin.)" (Brackets added).

Through its short term lease and ability to terminate relations, Shell is in the position to control the dealers' judgments. This allowed control of price judgments and the ability to control market position and entry through retail pricing.

The trial court had also erroneously excluded the FTC judgment against Shell Oil Co., *supra,* Pl. Ex. 168-170 for Id.

REASONS FOR GRANTING THE WRIT

IT IS A GREAT DEPARTURE FROM ESTABLISHED LAW WHEN COURTS OF APPEAL WEIGH THE EVIDENCE IN SUPPORT OF THE MOVING PARTY'S THEORIES IN A NON-SUIT MOTION. THIS IS ESPECIALLY SO WHEN THE EVIDENCE OF THE DEFENDING PARTY IS IN DIRECT AND SUBSTANTIAL CONFLICT WITH IT.

A. Both courts below erroneously weighed the evidence and chose to believe the defenses of Shell Oil Company.

1. There is no absolute defense to violations of the Sherman Act based upon a written and circulated declaration of policy when circumstantial evidence shows that the written statements do not reflect the true relationship of a defendant with its dealers.

It is respectfully submitted that it is clear that the trial court below weighed the evidence in a jury case and chose to believe the evidence of Shell despite substantial evidence to the contrary. Thus, the trial court stated as follows (Tr. 1842):

> "Now, in reviewing the evidence the court is to consider all the evidence, not just the evidence which supports the non-mover's case. The court must find that there is a substantial conflict in the evidence to create a question for the jury. But the fact that there might be a mere scintilla of evidence to support the case of the non-moving party is insufficient."

(At Tr. 1849):

> "Shell has shown that plaintiff was terminated on the basis of poor dealer performance. Shell has also shown that subject to plaintiff's termination Shell did not even immediately consider making its Mountain View station one of the experimental company-operated stations."

Although this constitutes fact weighing, the appellate court likewise referred to evidence offered by the defend-

ant and failed to discuss substantial evidence of the plaintiff which contradicted it. The appellate court stated that the trial judge correctly concluded that DeKelaita failed to produce sufficient evidence showing that Shell, by agreement with its dealers or by coercing them, engaged in retail price fixing. Clearly the issue is not one of sufficiency to convince a trial court, but one of substantial evidence upon which reasonable minds may differ. When substantial evidence exists the trier of fact alone determines the inferences from the evidence. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 566 (1931); *Tennant v. Peoria and P.U. Ry. Co.*, 321 U.S. 29 (1943); *Gunning v. Cooley*, 281 U.S. 90 (1930). The claim is made that plaintiff is estopped to deny that he alone was responsible for determining the price to be charged for gasoline at the two Shell stations that he operated (Appendix A, pp. ii-iii). This has reference to the Brief of Shell Oil Company citing the following transcript references: Tr. 1290-1291, 1539-63, 1575-76. At Tr. 1291 Mr. DeKelaita testified on cross-examination, "That I would just suddenly tilt the prices by dropping down," and that he would "do that without price assistance from Shell." But the context of this statement is that Mr. DeKelaita had been taught to do this by Shell. See Tr. 1245-1301. The transcript references at Tr. 1539-63 show only that Shell regularly communicated a suggested retail price to Mr. DeKelaita. Whether he went two cents or three cents below that suggested price was not specifically communicated to him, that there were no direct conversations after Shell dropped the price assistance program in August, 1972, that he could not afford to maintain his prices at three cents below suggested, that he was told his

spread was too high on gasolines, that he kept his Shell of the Future at Shell's own norm price, which he sold at a rate of about 10 gallons a day, that Shell employees would talk prices to him when he got out of line, that precision on the below suggested price was left to him. Tr. 1575-76 appears to have nothing to do with the fixing of prices but rather with the relationship between volume and price.

It is respectfully submitted that this testimony does not preclude a jury, in view of the evidence as a whole, from concluding that Shell had a scheme under which key dealers went below current market price in order to start a price war and that allowing great reward to the chosen dealer was part of Shell's scheme as shown by the leasing of the Mountain View station to petitioner.

Further, no authority of this Court tolerates as a defense to a price fixing agreement that it was not coerced by one of the parties. It is the agreement, express or implied, which the Sherman Act condemns. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960). When price fixing agreements are declared to be *per se* illegal the very means used to achieve the agreement are not defenses to the charge. It is incredulous to read that under the Sherman Act, a nonsuit may be allowed on the basis that the means used to achieve price fixing, exposition, persuasion and argument, are in themselves a defense to the very charge. This is not to be tolerated under the law as expounded by this Court. *United States v. Socony-Vacuum Oil Company*, 310 U.S. 150 (1940); *Simpson v. Union Oil Company*, 377 U.S. 13 (1964). And, of course, the agreement may be proved by circumstantial evidence,

viewed as a whole. *Continental Ore Corp. v. Union Carbide Carbon Corp.,* 370 U.S. 690 (1962).

With respect to exclusive dealings in gasoline, the same manifest error appears. Authorities do not require that service station dealers must show *written* agreements which clearly and unequivocally provide for the exclusive purchase of Shell gasoline and TBA. Plaintiff's evidence of proof of the substantiality of commerce, however, is not really contested. When ambiguous and virtually unintelligible language which appears in the product contract is interpreted by Shell to the dealer as requiring the purchase of its gasoline in the minimum gallonage as set forth in its agreements, the very words of §3 of the Clayton Act apply. It states, ". . . or understanding." The testimony in this case is that Mr. DeKelaita was told by Mr. Phillips, the Sales Supervisor of Shell as to the gallonage figure (Tr. 1268):

> "And at that time he was discussing the minimum what he wants out of that station. I believe it was eighty because that is what we agreed on the lease at, eighty minimum. Eighty thousand to pump out of that station."

Indeed, it is significant to point out that the very defense of Shell with respect to the price fixing and cancellation of Mr. DeKelaita is inconsistent with its defense as to exclusive dealings. Shell's defense on price fixing is that it only makes the dealers aware of the relationship between price and gasoline volume. But this further exposes the implicit demand that the dealer purchase all of his gasoline supplies from defendant who reviews his lease for renewal every one or three years.

There also exists the other provisions of the lease and product contract which make it virtually impossible for a dealer to carry other gasolines (Pl. Ex. 7, ¶3, Pl. Ex. 8, ¶5 (Shell identification), 6 (credit cards).

We are next told that there exists an absolute defense to a Section 3, Clayton Act exclusive dealing case and a Section 1, Sherman Act tie-in case in merely providing written policy statements that a dealer is free to buy products from any source. The granting of such immunity places the Ninth Circuit in direct conflict with the Fourth Circuit. It stated in *Osborn v. Sinclair Refining Co.,* 286 F.2d 832, at 837:

> "As previously noted, however, an agreement, arrangement or condition which unreasonably restrains trade in itself by price fixing, boycotts or tie-ins need not be expressly embodied in written contracts. Such arrangements may be deduced from a course of conduct."

Can there be any question that Mr. DeKelaita was required to buy at least $5,000 worth of tires and $3,000 of other accessories from Shell in order to obtain the Mountain View station? His purchases of tires from Shell was completely unnecessary. That he had to sell these tires at his cost is sufficient proof that Shell has promulgated an air tight requirements system requiring the dealers to purchase their tires, batteries, filters, their windshield wipers and specialties from it. The trier of fact is entitled to disbelieve the Shell statement of freedom of choice and conclude it is a subterfuge. The suggestion that plaintiff could buy and did buy from non-Shell sources on numerous occasions ignores the impact of the

testimony of the independent distributors of tires and accessories who testified that without question the Shell dealer did not carry inventories of stock on their shelves, but were always displaying the Shell product. Further, that, because of price advantage, the dealers would surreptitiously arrange for delivery of these products by individual orders. It appears that the only evidence which the court below would accept on the issue would be a clear demonstration that unless the product was purchased Shell would cancel the lease. Unwritten utilization of short term leases to require compliance was in this record, but, is clearly not necessary. All that is required is that there be a showing of sufficient economic power over the tying product to foreclose a substantial amount of competition. *Northern Pacific Ry. Co. v. United States,* 356 U.S. 1 (1958). That leverage itself supplies the coercion and does not need to be implemented by a further showing of threats of lease cancellation. This is also the teaching of another decision of the Ninth Circuit, *Lessig v. Tidewater Oil Co.,* 327 F.2d 459 (9th Cir. 1964), *cert. denied,* 377 U.S. 993 (1964). Shell, with 13% of the California market in gasoline, with thousands of service station locations, national trademarks, and petroleum supplies, may certainly be found to have appreciably restrained trade in the tire, battery and automotive accessory product lines. See *Standard Oil Co. of California v. United States,* 337 U.S. 293 (1949); *United States v. Richfield Oil Corp.,* 99 F.Supp. 280, aff'd, *per curiam,* 343 U.S. 922 (1951); *F.T.C. v. Texaco, Inc.,* 393 U.S. 223 (1968); *F.T.C. v. Shell Oil Co.,* 360 F.2d 470 (5th Cir. 1966); *F.T.C. v. Atlantic Refining Co.,* 381 U.S. 357 (1965). Shell may be

found to have conditioned its leases upon the purchase of its allied products in such quantities as may tend to lessen competition.

B. There was substantial evidence that the lease and products agreements were terminated pursuant to an unlawful price fixing combination or agreement or an attempt to monopolize interstate trade and commerce.

1. Shell's admission that changes in the law to require it to grant substance to its forms in its relations with independent dealers constituted proof that Shell had an intent to use its instruments of lease and product delivery as mere sham to hide its true purpose of treating the dealers as mere instrumentalities of its corporate decisions.

The power and ability to dominate all but the few multinational oil companies possessed by Shell as a major oil company in the United States can hardly be questioned. That the evidence in this record showed that Shell had the purpose and intent to control the independent judgments of independent dealers which was used to control market entry likewise cannot be questioned. Shell could have unilaterally lowered its base wholesale price or entered into valid defensive adjustment of its wholesale price, but chose not to do so. It chose, instead, to use the dealers as persons whose retail prices could be controlled so as to maintain a lid on the independents and potential entrants. Pl. Ex. 126 is a review of the San Francisco District's performance as of 12/20/72. Of the eight territories mentioned there Shell was in first or second place in all eight territories, and its share of the market was greater than all the independents combined. Apparently, either because of working alliances with other major oil companies or reasons known only to Shell,

it could not overtly beat the retail price of majors, but would state that it would do so only defensively (Vol. 1A Tr. 161). It was proven here that Shell worked covertly through small under-financed independent dealers to be first in dropping retail prices. This was the system, as has been seen, until August, 1972, when gasoline shortage was an effective deterrent to market entry and to maintain Shell's dominance. This spelled the end of Mr. DeKelaita's position with Shell.

Plaintiff's Exhibit 88, Appendix E, dated October 5, 1972, is critical to petitioner's termination case. It states in pertinent part:

> "Subject: Salary Operation-Conventional Service Stations Due Date: November 10, 1972
>
> "Due to political pressures and the enactment of state franchise laws (i.e., New Jersey) that have affected our present system of 'L' operation, Head Office-Retail Department is presently studying the feasibility of operating full-service conventional service stations on salary.
>
> "A task force has been assembled and a part of their study program involved establishing economic guidelines under which we can operate on a profitable basis."

The trier of fact can conclude from this exhibit that Shell was concerned about outside interference over its ability to control its L dealers. L stands for lease system, and the political pressure and references have to do with loss of control in using termination as a device of manipulation (Tr. 1030, 1091-1097, 351-352). But the point

is that Shell had already abdicated such use and such weapons by its language granting full independence, quoted above, in its leases.

This exposed reaction by Shell to law requiring it to live up to its forms proves that the form was always a sham. It is proof that Shell has manipulated the legal system to obtain the benefits of independent operation of service stations but none of the duties. Shell has been on notice since at least *Standard Oil Co. of California*, *supra*, if not *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1940) that a change in substance was required. Judicial reaction to the proof of intent to monopolize should clearly be not one of nonsuit, but of allowing a remedy for a proven wrong. For the proof, then, is that Mr. DeKelaita was placed into a sham system. The promises made to him were good only as long as Shell desired to use him as a price leader. When gasoline shortages changed the needed tools to control market entry, Mr. DeKelaita was terminated. Petitioner is thus entitled to extensive damages upon alternative theories. He was induced to become a member of a price fixing combination among Shell and its lessee dealers and has suffered extensive damages when Shell lost use of his services; or, he was terminated by a company with a proven intent to monopolize the sale of petroleum products and automotive accessories pursuant to a new phase of its ever present intent to monopolize; or, he was terminated without payment of just compensation by Shell pursuant to an ever present intention to maintain a system of fear and futility in the dealer's relations with Shell.

Termination of contractual agreements pursuant to conduct violative of the antitrust laws is manifestly actionable. *Simpson v. Union Oil Co., supra.*

The Sherman Act respects the good will values of independent dealers who have worked long hours and have invested their savings in their businesses. See *Richfield Oil Co. v. United States, supra.* Clearly, in a lawsuit whose foundation is the independence of the dealer as established in *Richfield,* that very foundation cannot be ignored under the veil of written documents proven to be sham. Existing dealers are protected from seizure of their businesses by their supplier who seeks to gain control over an appreciable segment of the market upon proof of the unlawful intent. *United States v. Paramount Pictures,* 334 U.S. 131 (1948); *Standard Oil of California v. United States,* 337 U.S. 293, 310 (1949).

2. Shell's termination of DeKelaita without payment of values for his business upon a lease that had two more years to run and its determination to litigate based upon sham defenses was undertaken to give notice that it was useless to fight Shell in its takeover scheme.

The record disclosed that the factual defense of Shell completely lacked credibility. Although the defense was that DeKelaita was an inefficient dealer, Shell's own stipulated reason for the termination was that it could terminate the contract without cause within the first 12 months. Even more importantly, the charges against Mr. DeKelaita are either not in breach of the lease or are violative of the Sherman Act's demand that a party may not create economic distress and then use that very economic distress to thwart the equities of the victim. Shell could not

use high rents for the purpose of price control and then when shortages of gasoline and international politics caused the evolution of a different market use that very rental control to evict a dealer without the payment of damages. Clearly, the defense that DeKelaita was a bad dealer was fictitious. How could the most successful dealer in the district who was then available to lease Shell's best unit suddenly become a bad dealer? There was something to gain by Shell in DeKelaita's termination at the time he was ousted, the use of a major station for self operation, increased gasoline allocation which was placed on quota. On acquisition of the Mountain View station Shell helped itself to 100,000 gallons a month gasoline quota, notwithstanding that Shell dealers were placed on a quota which was based on their monthly gallonage of the previous year (Tr. 400-402; Pl. Ex. 99, 388, 41). The exemplification of Mr. DeKelaita as a dealer who could be ousted at will constituted a warning of the futility in seeking good will compensation.

Clearly, petitioner has shown that there exists substantial evidence that the defenses of Shell as to the termination are not to be believed. That sham defenses are presented is evidence of the continued attempt to control the dealers and prevent them from exercising those judgments the Sherman Act allows and encourages. Thus, the litigation here is used as exemplification of the futility of suing Shell Oil Co.

What has occurred, then, is that this Court's mandates that unlawful conduct cannot be shielded from liability have not been heeded upon the ground of dealer fault. The inability of Mr. DeKelaita to have the funds to op-

erate a large service station may not, however, be used to perpetuate a restraint of trade. It is inequitable to utilize the economic distress of another for economic gain. See California Civil Code, §1575. But petitioner's remedies are not limited to the common law. Antitrust rights are involved when a dealer is unceremoniously terminated because of his supplier's control of resale prices or specific intent to restrain trade. *Simpson v. Union Oil Co. of California,* 377 U.S. 13 (1964).

The economic problems of a dealer in relation to a billion dollar company does not end lawsuits; they may not be used to deprive him of his economic rights upon proof that they are being used to perpetuate public wrongs. Since the entry into public wrongs by a plaintiff in an antitrust suit does not bar recovery from a violator who has injured the plaintiff under *Kiefer-Stewart v. Joseph E. Seagram & Sons,* 340 U.S. 211 (1951), certainly, the fact that a small businessman cannot meet the rent demands in a written lease entered into upon assurances that they would be disregarded as long as the dealer "pushed the juice" is not a bar to this action. Only the trier of fact can pierce Shell's real programs, plans, activities and specific intent. The evidence here allowed that determination.

The court below cites *Bushie v. Stenocord Corp.,* 460 F.2d 116 (9th Cir. 1972) as authority to allow the deprivation of out-of-pocket losses and good will values by a dominant marketing company. *Bushie* does not deal with the problem here, that of courts of law facing a company whose business relations with dealers are hidden by written instruments to mask restraints of trade, and the

continuation of that fraudulent policy in order to advance to the next step in market domination. That is the case before the court. There was substantial evidence to show Shell promulgated and maintained a deceptive and fraudulent marketing system during the entire period Mr. DeKelaita was in the station. The antitrust laws do allow damages against those using the instrumentality of lease termination of a lease which must have been entered into with a long period of time in mind and do respect the rights of independent dealers. Among these rights are the right to be free of a system of control which treats them as mere employees, a termination scheme which disregards antitrust rights. Clearly, the evidence to show this course of conduct was substantial.

Clearly, also, the court erred in excluding plaintiff's evidence of an intent to monopolize trade which was in effect at least from the 1950's under *Continental Oil Corporation v. Union Carbide & Carbon Corporation,* 370 U.S. 690 (1962).

This Court should issue a writ of review, or in the alternative, remand the case for trial under the decision of *Norfolk Monument Company v. Woodlawn Memorial Gardens, Inc.,* 394 U.S. 700 (1969), reversing, *per curiam,* 404 F.2d 1008 (4th Cir. 1968). As this Court outlaws direct forms of restraint of trade, powerful firms will resort to sham and will hide behind the mask of purported compliance. Courts of law are to pierce these forms and not allow their use to immunize what is in reality forbidden conduct.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari ought to be granted.

Dated, San Francisco, California,
April 3, 1978.

MAXWELL KEITH,
Attorney for Petitioner.

(Appendices Follow)

Appendices

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 75-2421

Daniel A. DeKelaita, Plaintiff-Appellant, vs. Shell Oil Company, Defendant-Appellee.	

[Filed Feb. 28, 1978]

Appeal from the United States District Court
for the Northern District of California

MEMORANDUM

Before: Duniway and Kilkenny, Circuit Judges,
and Skopil,* District Judge

Any resemblance between the case described in DeKelaita's brief and the case actually disclosed by the evidence presented byDeKeltaita at the trial is miniscule. What is missing in the brief is the disclaimer that used to appear at the beginning of motion pictures, stating that any resemblance between characters in the picture and actual persons, living or dead, was purely coincidental.

*The Honorable Otto R. Skopil, Jr., Chief Judge, United States District Court for the District of Oregon, sitting by designation.

Here, as in *Hanson v. Shell Oil Co.*, 9 Cir., 1976, 541 F.2d 1352, *cert. denied*, 1977, 429 U.S. 1074, what we have is a service station operator who was a "loser in the competitive endeavor [and] decided to try the antitrust laws as a means of shifting his losses to someone else." (541 F.2d at 1355).

In considering Shell's motion for a directed verdict, the trial court applied the proper legal standard, as set out in *Chisholm Brothers Farm Equipment Co. v. International Harvester Co.*, 9 Cir., 1974, 498 F.2d 1137, 1139-40, *cert. denied*, 1974, 419 U.S. 1023. There we said that, while directed verdicts are to be used "sparingly in complex antitrust litigation where motive and intent play leading roles," (quoting *Poller v. Columbia Broadcasting System Inc.*, 1962, 368 U.S. 464, 473) an antitrust plaintiff, in order to survive a motion for a directed verdict, must "present enough evidence within his case-in-chief to support a reasonable finding in his favor . . . ." That DeKelaita failed to do. The trial judge did not "view plaintiff's evidence in the light of Shell's defenses" as DeKelaita claims. Rather, when DeKelaita rested, the court considered the voluminous evidence submitted by DeKelaita over the course of the ten trial days, in the light most favorable to him. The court concluded that the evidence was insufficient to support a verdict in DeKelaita's favor with respect to any of the issues in the case.

The trial judge correctly concluded that DeKelaita failed to present sufficient evidence showing that Shell, by agreement with its dealers, or by coercing them, engaged in retail price fixing. DeKelaita testified that he

alone was responsible for determining the price to be charged for gasoline at the two Shell stations that he operated. Moreover, DeKelaita's exhibits, showing the prices actually charged by him, demonstrate that he did not adhere to Shell's suggested retail price schedule. As the trial judge said, "Mr. DeKelaita's own exhibits indicate that at times he sold gasoline at the suggested level, at times he sold below the suggested level, and at times he sold above the suggested level." Similarly, De Kelaita's own evidence makes it clear that he was not coerced by Shell. It is not "coercion" to use "exposition, persuasion and argument," which is the most that the evidence shows. *Gray v. Shell Oil Co.*, 9 Cir., 1972, 469 F.2d 742, 748, and cases cited, *cert. denied*, 1973, 412 U.S. 943.

The trial court properly concluded that DeKelaita failed to present sufficient evidence to support his allegations of unlawful tying and exclusive dealing. The leases and product agreements for the two service stations which DeKelaita operated did not require him to purchase minimum quantities of Shell gasoline. Indeed, these instruments, while they stated Shell's maximum delivery obligation, imposed no purchase obligation on DeKelaita at all.

Similarly, with respect to tires, batteries and accessories, neither the leases nor the product agreements required DeKelaita to purchase even minimum quantities from Shell. The company's written policy statement, which DeKelaita twice received, provides that a dealer is "free to buy [tires, batteries and accessories] from the supplier of his choice" and further states that Shell will

endeavor to sell its products to dealers on the basis of "quality, price and public acceptance rather than contractual provisions." There is no evidence of coercion on Shell's part; what the evidence demonstrates is that DeKelaita took full advantage of Shell's policy, and purchased tires, batteries and accessories from non-Shell sources on numerous occasions.

DeKelaita failed to show an attempted monopolization in the sale of gasoline and other products, or any of them. While he claimed that Shell had terminated his lease as part of a nationwide plan to convert high-volume service stations to company operations, he failed to substantiate this claim with evidence. What his evidence shows is that his dealership was terminated because of his unsatisfactory performance and repeated failures to comply with the terms of his lease. If there was any monopolization by Shell, it was "monopolization" of the sale of its products at one retail service station in Mountain View, California. This is not a violation of the antitrust laws. *Bushie v. Stenocord Corp.*, 9 Cir., 1972, 460 F.2d 116, 120-21, and cases there cited.

It was not an abuse of discretion to exclude the damage exhibits prepared by Weiner, DeKelaita's "expert" accountant. Weiner testified that he was not an expert in business valuations; that he knew little about the service station business; that he had never seen DeKelaita's books or records; and that, in estimating loss of future profits, he relied solely on figures supplied by DeKelaita's counsel. Under these circumstances, it would have been error to admit the proffered exhibits. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 9 Cir., 1969, 416 F.2d 71, 85-89, *cert. denied*, 1970, 396 U.S. 1062.

The trial court did not abuse its discretion in striking a testimonial answer regarding motor oils. The subject of motor oils was not raised in any of DeKelaita's pretrial briefs or memoranda.

It was not error to exclude various pricing studies, pricing schedules and other of Shell's company records which DeKelaita sought to introduce at trial. These documents were remote in time and subject matter and bore no relevance to DeKelaita's claims. The same is true of three proposed exhibits concerning tankwagon prices in force before DeKelaita became a Shell dealer.

The trial court properly excluded the complaint, opinion and final judgment issued in a Federal Trade Commission proceeding conducted during the 1950's. The entire proceeding concerned a method of marketing Shell accessories which the company had discontinued many years before DeKelaita became a Shell dealer.

The four memoranda prepared by Shell personnel which detailed the reasons for terminating DeKelaita's dealership fell within the business records exception to the hearsay rule. F.R.E. 803(6). They were properly admitted.

We need not pass upon DeKelaita's argument that the trial court erred in concluding that there was insufficient evidence to show a necessary link to or effect upon interstate commerce. Assuming that the evidence was sufficient in that respect, it was still insufficient to show any violation of the antitrust laws.

It was not an abuse of discretion to require DeKelaita to return to Shell at the close of the case various documents discovered from Shell but not received in evidence at the trial, in order to protect the company's confidential business records. DeKelaita has not shown that the court's protective order prejudiced him in any way.

Other claims of error do not merit discussion.

The motion of Shell Oil Company to strike supplementation of the record, filed on October 9, 1975, and referred to this panel by a motions panel of this court on November 12, 1975, is granted. See Rule 107(c), Rules of the District Court for the Northern District of California. The proposed Supplemental Record, designated as Vol. V A, is stricken.

The judgment is affirmed.

Appendix B

TRANSCRIPT OF PROCEEDINGS

In the United States District Court for the Northern District of California

Honorable William H. Orrick, Presiding

[1841] Tuesday, May 6, 1975—10:12 o'clock a.m.

(Jury present.)

THE CLERK: C-74-0644, DeKelaita vs. Shell Oil Company; for further jury trial.

MR. KEITH: Ready for the plaintiff, Your Honor.

MR. SIMON: Ready for the defense.

THE COURT: Mr. Simon.

Ladies and Gentlemen of the jury, at the close of the plaintiff's case, it is often necessary for the Court to review the evidence that has been presented and determine whether or not the plaintiff has established a prima facie case to support the violations of the law that he has alleged. And the Court does this on motion.

If, after reviewing the evidence in a case, the Court finds that a jury could reasonably infer that the plaintiff has established his case, then the trial continues; and the defendants are given an opportunity to present defenses, and to rebut the plaintiff's evidence.

If, however, the Court determines that, even making the most favorable inferences for the plaintiff, that the evidence permits, that no reasonable juror could find that the plaintiff has carried his burden of proving a prima

facie case, then it becomes the duty of the Court to grant a directed verdict. In other words, the Court will then take the [1842] decision away from the jury, and the Court will decide the case on the basis of the evidence that's already been presented.

Now, in so doing, the Court must make all inferences that can be made from the evidence in favor of the plaintiff. And it's an awesome power; and it's a power that's to be used cautiously and sparingly. But it is power that the Court must exercise. As the Supreme Court has pointed out, it becomes his duty to exercise it when he's made that determination.

Now, in reviewing the evidence the Court is to consider all the evidence, not just the evidence which supports the non-mover's case. The Court must find that there is a substantial conflict in the evidence to create a question for the jury. But the fact that there might be a mere scintilla of evidence to support the case of the non-moving party is insufficient.

In this case the defendant Shell Oil Company has moved for a directed verdict on all counts raised by the plaintiff.

I have spent a substantial amount of time over this past weekend considering this motion, and reviewing the daily transcript and the exhibits; and I've also had the benefit of briefs from counsel; and, yesterday, oral argument which took about two and a half hours.

On the basis of my review of the record, and my [1843] consideration of the arguments of counsel, I have determined that it is my duty to direct a verdict for the

defendant Shell Oil Company on all claims of violations of antitrust laws which have been raised by the plaintiff DeKelaita.

This means that I'm deciding the case in favor of the defendant, as a matter of law.

You will not be called upon to weigh the evidence or to reach a verdict.

I'm now going to explain to you my reasons for granting a directed verdict on the price fixing and tying allegations under Section I Sherman Act and Section III Clayton Act, and the allegations of an attempt to monopolize in violation of Section II of the Sherman Act.

This case, basically, presented three questions.

First, whether Shell terminated DeKelaita's lease and his dealer agreement as part of a national plan to place high-volume gasoline service stations under Shell's company operation, with the purpose or intent of monopolizing the trade or commerce of gasoline, and the so-called TBA products in Northern California.

The second question was whether Shell fixed the retail gasoline prices of DeKelaita while he was a service station operator.

And the third question was whether Shell required or forced DeKelaita to buy tires, batteries and accessory products, [1844] such as the filters.

Now, I grant a directed verdict for the defendant on plaintiff's allegations that the Shell Oil Company violated Section I of the Sherman Act by imposing a vertical

price-fixing arrangement on the plaintiff's sale of gasoline.

The plaintiff alleges a national plan was used by Shell to set gasoline prices. Shell concedes that it utilized a wide-spread plan of suggested prices.

However, the plaintiff does not base his price fix on this suggested pricing plan. Rather, he contends that Shell forced him to sell at a price below the suggested retail price.

I find that the plaintiff has failed to show that this alleged price fix below suggested price has a substantial effect on interstate commerce, which it must.

Accordingly, I find that the Court lacks jurisdiction over this price-fix claim.

Although the commerce clause and the Congressional regulation of the business activities must be given broad scope in applying the jurisdictional requirements of the antitrust laws, there are limits to the reach of Congressional regulation. And the Ninth Circuit made this clear in the Western Liquid Asphalt against Copp Paving Company case.

It's up to the Court to make a case-by-case determination of whether the requisite substantial effect **[1845]** on interstate commerce has been demonstrated. In this case plaintiff, at the very best, has shown that as a single dealer operating within California he was forced to price below the suggested price.

This case presents a very different question from a leading Supreme Court case, Simpson against the Union

Oil Company of California, where it was conceded that a consignment agreement was used in seven states throughout the country.

And it also presents a very different situation from Lehrman against the Gulf Oil Corporation, which is another Court of Appeals case, where—and on the face a neutral price-assistance program was utilized throughout the country, and could be applied in a coercive fashion.

In the case that we are considering here, the plaintiff has not established that the plan on which he rests his price-fixing theory, a plan to price below suggested retail price, was applied neutrally on a wide scale. At best, his price-fix theory rests on a localized application of an aberration from Shell's general suggested price policy. An isolated application of a price-fixing scheme in one gasoline station within the borders of California does not come within the scope of the federal antitrust laws.

I further find that there is inadequate evidence to support a prima facie showing that plaintiff's prices were in fact fixed below the suggested price level. Mr. DeKelaita's **[1846]** own exhibits indicate that at times he sold gasoline at the suggested level, at times he sold below the suggested level, and at times he sold above the suggested level.

In addition, the plaintiff, himself, testified that he was responsible for determining the price to charge for the gasoline. He said that he determined the price.

I find that no reasonable juror could find, on the basis of the evidence presented, that the plaintiff had entered

into a coercive agreement with the Shell Oil Company to fix retail gasoline prices.

Finally, I find that the plaintiff's damages are highly speculative on the price-fix allegations, although a plaintiff in an antitrust action need not show his damages with mathematical precision. And that principle was decided by the Supreme Court in Bigelow against RKO Radio Pictures. I followed that standard.

And based on that liberal standard, I permitted the plaintiff to keep his price-fix damages in evidence. But I find these exhibits, standing alone, are too speculative to permit the price-fix issue to go to the jury.

Plaintiff estimated lost profits based on a volume of gasoline he was able to sell at a low price. He then goes on to compute the additional profit he would have made had he sold at the higher suggested price. However, the plaintiff does not consider whether or not his volume of sales would **[1847]** have decreased at the higher price.

The evidence of plaintiff's past operations show that, in fact, his volume of sales did decrease when the price increased.

And I—relying on a case in this Circuit called Gray against the Shell Oil Company, I find that the damages from the alleged price fix are too speculative to submit the issue to the jury.

Now, on the question of tying arrangements, I direct a verdict in favor of the defendant on the plaintiff's claim that the Shell Oil Company violated Section I of the Sherman Act and Section III of the Clayton Act,

requiring the plaintiff to purchase Shell tires, batteries and accessories as a condition of leasing the gas station.

Plaintiff has made enough of a showing that at least the air filters were produced outside the State of California and were shipped into the state for distribution, so that the Court can reasonably find that the air filters were in the flow of commerce, and sustain federal jurisdiction.

As for the tires and batteries, although these products were produced in California, if Shell had a widespread tying arrangement on these products, the tying arrangement would have had a substantial effect on commerce.

However, I find that the evidence, viewed in the light most favorable to the plaintiff, does not support this **[1848]** tying claim. I find that the plaintiff has failed to prove that he was required to purchase Shell tires, batteries, or air filters as a condition of operating the station. And the fact of the matter is that the plaintiff did purchase tires and batteries and air filters from dealers other than Shell.

I find that the lack of evidence to support the tying claim requires me to direct a verdict for the defendant on this issue.

In addition, I find that as far as the tying allegations for tires and batteries, plaintiff's damages are too speculative. And I've already excluded plaintiff's damage exhibits for the tires and batteries, since he failed to show comparable or competitive products were available to him at a lesser price. Since these damages were ex-

cluded, I have no choice but to direct a verdict for the defendant on these issues.

And I must follow the precedent in this Circuit; and, again, it's this case called Gray against the Shell Oil Company.

Finally, with regard to the Section II violation, the attempt to monopolize, I grant a directed verdict for the defendant Shell Oil Company on plaintiff's claim that the defendant terminated plaintiff's gas station lease at the Mountain View station in an attempt to monopolize commerce in violation of Section II of the Sherman Act.

[1849] Plaintiff has alleged that he was terminated as part of a national plan by the Shell Oil Company to convert independent Shell gas stations to company-operated stations.

However, the plaintiff has not produced sufficient evidence to allow a reasonable juror to find that such a plan existed. Plaintiff has not shown any national plan to convert stations. He has not shown that Shell intended to monopolize. At best, he has demonstrated that Shell was interested in converting a few independent gas stations to company-operated stations on an experimental basis.

Nor has the plaintiff established a causal connection between his termination and even this limited experimental plan.

Shell has shown that the plaintiff was terminated on the basis of poor dealer performance. Shell has also shown that subject to plaintiff's termination Shell did not even immediately consider making his Mountain View

station one of the experimental company-operated stations.

I find that the plaintiff has not sufficiently established a prima facie case to warrant presenting the Section II violation to the jury.

And one final word on whether or not there's commerce in the case.

It's the duty of the Court, not the jury, to determine whether or not there is sufficient interstate commerce to give **[1850]** the Court jurisdiction.

In this case the jurisdictional issues are interwoven with the facts of the case. And, so, at the commencement of the trial I found, as a matter of law, that the plaintiff had alleged enough of a national plan on the part of Shell to take over independent gas stations to have a substantial impact on interstate commerce, and support federal jurisdiction under the commerce clause. And I was there following the rule in Rosen against Rossmoor, another Court of Appeals decision.

However, as the facts of the case developed, the plaintiff failed to establish any such national scheme. I am compelled, therefore, to reconsider my ruling on the jurisdictional question.

I find that the plaintiff has not shown that Shell's acts in converting independent gas stations to company-operated stations were part of a national plan. I find that the conversion that Shell did put into effect did not have enough of a wide-spread impact to substantially affect interstate commerce.

And you will recall that there was one out of 200 stations in Northern California—and that's the Mountain View station—that was converted to company operated. There were seven out—that was in the San Francisco district. There were seven out of 900 in all of Northern California. [1851] And in the entire nation there were only 37 out of 9,000 conventional service stations converted to company operation.

I, therefore, find that the Court does not have jurisdiction over the Section II attempt-to-monopolize claim which was raised by the plaintiff.

But, even assuming that the plaintiff had established that the termination was part of a national conversion plan, he has not shown, as he must under the law, that there was a dangerous probability of succeeding in monopolizing the market. This dangerous probability of success is essential to a prima facie showing in Section II Sherman Act case.

At first, plaintiff defined the relevant market as the gasoline and TBA market in Northern California. However, the plaintiff has failed to establish that the defendant could have come at all close to monopolizing this market. Shell was only one of a number of competing gasoline and auto parts distributors operating in the Northern California market. And, at best, could have obtained about 20 percent of the gasoline market.

In his opposition papers to the motion for directed verdict, the plaintiff now defines the product market, not as gasoline, but as the Shell's so-called L stations, these stations that were leased.

Although Shell could, certainly, have obtained a monopoly over its own stations, had it desired to do so, it is [1852] the law that a manufacturer can lawfully terminate its own dealers, and distribute its products through its own outlets, unless the manufacturer engages in deceptive trading practices and upsets the broad market structure by this change in distribution.

And my brother Judge Renfrew so held in Knutson v. Daily Review, Inc. And it was also held in a Court of Appeals decision in Industrial Building Material v. Inter-chemical Corporation.

A manufacturer cannot monopolize his own product in violation of Section II of the Sherman Act, unless the product is unique; and, consequently, takes over the independent—the takeover of the independent distributors results in a monopolization of the entire market. And this is the rule in another Ninth Circuit case called Bushie against Stenocord.

Shell gasoline and automotive products were in no way unique.

Finally, I find that the inadequacy of plaintiff's damages, his damage estimates for his termination damages, precludes presenting this portion of the case to the jury.

In an antitrust action damages must be ascertainable with reasonable certainty before the matter may be presented to the jury.

The plaintiff's Exhibit No. 137 deals with damages from termination. I have already excluded that exhibit on the [1853] grounds that it was too speculative, and was based on the plaintiff's, and the plaintiff's counsel's,

undocumented estimates of what the damages might be as a result of the termination. In excluding that document I was relying on Joseph E. Seagram against Hawaiian Oke and Liquors, Limited, which is another Court of Appeals case.

Since the plaintiff cannot establish any damages as a result of his termination, he is not entitled to have the issue submitted to the jury.

And, now, as I am about to discharge you, I want to again express the appreciation of the Court for your service.

You have been faithful, timewise, more accurate than the Court by a good deal; you have paid close attention to the facts as they have been developed through the witnesses and through the exhibits. An antitrust case is never easy to grasp; and I think that this—in this case the evidence was difficult to grasp.

But nobody gave up; everybody paid close attention; and I can say that as a fact, because I paid the closest attention to see if you were.

I want to say one word about the service, the quality of the—the importance of the service that you render.

In my view there is no more sacred public trust than to be chosen as a juror to try a case, to sit in judgment on **[1854]** the acts and motives of one's fellowman.

The law, which it is the Court's duty to declare, is found with comparative ease. But the facts of the case, of which you as the jurors are exclusive judges when the case is submitted to you, are nowhere written; they

are usually much in dispute; and they are difficult to ascertain.

The system of trial by jury is of the utmost importance in our system of government. It is embedded in our Constitution in Article III, and in the Sixth and Seventh Amendments. It is a right that every American citizen has. And it stands as the keystone of our system of justice. It is the connecting link, if you will, between the courts and the people. And it protects the people. And I mean this, from the government.

The origins of trial by jury are shrouded in the mists of the medieval past. It is thought that it started with the Frankish kings, was brought to England, and was finally embedded in the English tradition, in the Magna Charta in 1215.

When the colonists came to this country, they declared as early as 1765, in a Declaration of the Rights and Grievances of the Colonists in America—and I quote that:

"Trial by jury is the inherent and invaluable right of every subject in these colonies."

And again, years before the Constitution was enacted, **[1855]** in the next Declaration of Rights, made in Philadelphia in 1774, among the first resolves were demands for all the colonists of the "great and inestimable privilege of being tried by their peers of the vicinage."

And the Declaration of Independence charges that one of the repeated injuries and the usurpations giving cause for that illustrious document was for "depriving us in many cases of the benefits of trial by jury."

And, so, when independence came, trial by jury became one of the institutions which America would preserve at all costs.

You have done your duty. I again express the appreciation of the Court; and you are now discharged.

Mr. Clerk, will you lead the jury out?

THE CLERK: Yes, Your Honor.

MR. KEITH: Your Honor, may we—before the jury is discharged, note that we do wish to make motions. And I have no . . .

THE COURT: Yes.

MR. KEITH: . . . . no insistence they be done in the presence of the jury.

And may the record also show that one juror is missing this morning.

THE COURT: Yes. We know that.

MR. KEITH: We have a six panel this morning.

Appendix C

United States District Court
for the Northern District of California

Entered in Civil Docket 5-7 1975

Civil Action No.
C-74-0644-WHO

Daniel A. DeKelaita,
Plaintiff,
vs.
Shell Oil Company,
Defendant.

[Filed May 7, 1975]

Notice

In accordance with LR 124 (c) costs will be taxed in accordance with the bill of costs unless objections are filed.

JUDGMENT

This action having come on for trial before this Court and the jury, Honorable William H. Orrick, Jr., United States District Court Judge presiding, and the plaintiff having presented all of its evidence, and having rested;

Based upon written motions for directed verdicts filed on Monday, May 5, 1975, by defendant at the close of plaintiff's case, with supporting memorandum, having fully considered the responsive memorandum of plaintiff filed on May 5, 1975, having independently reviewed the evidence entered at trial, including the transcript of trial, and having heard oral argument by both parties;

It Is Ordered And Adjudged that defendant Shell Oil Company's motions for directed verdict are granted, that defendant Shell Oil Company have judgment against the plaintiff Daniel A. DeKelaita, and plaintiff's case is dismissed.

Dated at San Francisco, California, this 6th day of May, 1975.

/s/ William H. Orrick, Jr.
United States District Court Judge

Appendix D

STATUTES INVOLVED

Section 4 of the Clayton Act provides:

"That any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust Laws may sue therefor in the District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Sections 1 and 2 of the Sherman Act provide (Sherman Act, Sections 1 and 2, July 2, 1890, Chapter 647, Sections 1, 2, 26 Stat. 209, 15 U.S.C., Sections 1, 2):

"Section 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several states, or with foreign nations, is hereby declared illegal. . . .

"Section 2: Every person who shall monopolize or attempt to monopolize or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."

Section 3 of the Clayton Act, 15 U.S.C. Sec. 14, October 15, 1914, C. 323, Sec. 3, 38 Stat. 731 provides as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodi-

ties, whether patented or unpatented, for use, consumption, or resale within the United States or any territory thereof or in the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors for the lessors, seller, with effect of such lease, sale, or contract for sale, or such condition, agreement or understanding made to substantially lessen competition or tend to create a monopoly in any line of commerce."

Appendix E

PLAINTIFF'S EXHIBIT 88

Shell Oil Company

Private & Confidential

To Marketing Region Vice President
Eastern - Central - Western

Date October 5, 1972

From Manager—Retail Department
Head Office—Houston

Subject Salary Operation—
Conventional Service Stations
Due Date: November 10, 1972

Due to political pressures and the enactment of state franchise laws (i.e., New Jersey) that have affected our present system of "L" operation, Head Office—Retail Department is presently studying the feasibility of operating full-service conventional service stations on salary.

A task force has been assembled and a part of their study program involved establishing economic guidelines under which we can operate on a profitable basis. However, due to the limited number of units we now have on salary, it is extremely difficult to generate substantial information that can be used to establish economic guidelines which can be related to actual field experience.

Therefore, we are requesting that each Marketing Region nominate four full-service units that can be converted to "S-I" (Salary-Interim) in order to gain the necessary field experience. The criteria for these units should be as follows:

1. Of the four units, one I-Road and one SHELL-SHAPE unit (if possible) should be included.
2. Units must be available for conversion to "S-I" prior to December 31, 1972.
3. Volume—70,000 gallons or above.
4. Market average potential for sales "below the line" (exclude units in declining markets).

Although the above criteria would provide the optimum situation, if you have units with the potential to exceed the above, those units will also be considered. Present "S-I" operations should not be included.

Once submitted to Head Office—Retail, the units will be reviewed and final selection will be made. It is our intent to get a good cross sampling of units in different areas.

Once the final selection is made, the units should be operated on our present "S/C" program with a Shell salaried manager and contract labor as our operating force. The Payroll Economy Plan (PEP), now being used in tunnel car washes and self-serves will apply.

May we have your nominations by November 10, 1972.

/s/ G. O. Chadwick
for R. L. Cheatham

cc: Head Office—Houston
General Manager—Retail Marketing
Manager—Retail Field Services

Eastern - Central - Western
Region Marketing Managers
Region Retail Managers